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83-947

No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IOWA ELECTRIC LIGHT AND POWER COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND APPENDIX TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Nuclear Regulatory Commission or the National Labor Relations Board should regulate the management structure at petitioner's nuclear power plant.

Whether there is substantial evidence to support the finding that Quality Control Inspectors at petitioner's nuclear power plant are not supervisors or managers.

TABLE OF CONTENTS

Page

Questions Presented for Review i
Table of Contents ii
Table of Authorities iii
Opinion Below 1
Jurisdiction 1
Statutes and Regulations 1
Statement of the Case 2
Reasons for Granting the Writ 3
The Court of Appeals Misread the NCR Regulations 3
The Findings of the NLRB and the Court of Appeals Are Not Supported by Substantial Evidence 7
Statutes and Cases 11
Conclusion 15
Appendix 17
Certificate of Service F-9

TABLE OF AUTHORITIES

	Page
Arizona Public Service Company v. NLRB, 453 F.2d 228 (9th Cir. 1971)	14
Maine Yankee Atomic Power Company v. NLRB, 624 F.2d 347 (1st Cir. 1980)	13, 14, 15
NLRB v. Bell Aerospace Company, 416 U.S. 267, 40 L.Ed.2d 134, 94 S.Ct. 1957 (1974)	12
NLRB v. Detroit Edison, Co., 537 F.2d 239 (6th Cir. 1976)	15
NLRB v. North Arkansas Electric Cooperative, Inc., 412 F.2d. 324 (8th Cir. 1969) and 446 F.2d 602 (8th Cir. 1971)	12
NLRB v. Pilot Freight Carrier, Inc., 558 F.2d 205 (4th Cir. 1977), cert. den. 434 U.S. 1011 (1978)	12
NLRB v. Yeshiva University, 444 U.S. 672, 63 L.Ed.2d 115, 100 S.Ct. 856 (1980)	12
Ohio Power Company v. NLRB, 176 F.2d 385, 11 ALR 2d 243 (6th Cir. 1949), cert. den. 338 U.S. 899 (1949)	11
Southern Indiana Gas and Electric Co. v. NLRB, 657 F.2d 878 (7th Cir. 1981)	14
Statutes	
28 U.S.C. § 1254	1
29 U.S.C. § 152(3)	11
29 U.S.C. § 152(11)	11
29 U.S.C. § 158(a) (5)	3
29 U.S.C. § 160	3
Other Authorities	
American National Standard N45.2 - 1971	6
American National Standard N45.2.6 - 1973	6

Page

Guidance on Quality Assurance Requirements During the Operations Phase of Nuclear Power Plants 6

Qualifications of Inspection, Examination, and Testing Personnel for the Construction Phase of Nuclear Power Plants (ANSI N45.2.6 - 1973) 4

Qualifications of Inspection, Examination and Testing Personnel for Nuclear Power Plants (ANSI N45.2.6-1978) 4

Title 10, Energy, Code of Federal Regulations, Part 50, Appendix B, entitled "Quality Assurance Criteria for Nuclear Power Plants and Fuel Re-processing Plants" 5

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The opinion of the court of appeals is reported at 717 F.2d 433 (8th Cir. 1983) and is set forth in the appendix beginning at page D-1.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1983. This petition is filed within 90 days of that judgment. Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS

The following statutes and regulations are set forth in the appendix:

Page

28 U.S.C. § 1254 ..... F-1
29 U.S.C. § 160 ..... F-1
29 U.S.C. § 152(3), (11) F-2
29 U.S.C. § 158(a) (5) F-2
Title 10, Code of Federal Regulations, Appendix B F-3
Guidance on Quality Assurance Requirements During the Operations Phase of Nuclear Power Plants F-5
Qualifications of Inspection, Examination, and Testing Personnel for the Construction Phase of Nuclear Power Plants (ANSI N45.2.6 - 1973) F-7
Qualifications of Inspection, Examination and Testing Personnel for Nuclear Power Plants (ANSI N45.2.6-1978) F-9

STATEMENT OF THE CASE

Petitioner, Iowa Electric Light and Power Company (IE) is a public utility providing electric service. It operates a nuclear power plant at Palo, Iowa. IE and the International Brotherhood of Electrical Workers, affiliated with the AFL-CIO (Union), have a collective bargaining agreement covering a unit of production and maintenance employees at the plant. (Exhibit E 14)

Article I, Section 1, of the contract describes the bargaining unit as including production and maintenance employees but expressly excludes ". . . supervisors as defined in the National Labor Relations Act." Article I, Section 2, of the contract provides a procedure for adding to the unit a majority of any classification of employees "who are not excluded" from the unit.

The Union petitioned the National Labor Relations Board (NLRB) to include three Quality Control Inspectors in the unit. IE resisted for the reasons that these positions are supervisory and managerial. After a hearing the Acting Regional Director of the NLRB issued a Decision and Direction of Election. (App. p. A-1) The NLRB reviewed the decision and by a three to two vote, affirmed. The NLRB decision was in the form of a summary telegram. (Chairman Fanning, and members Penello and Truesdale voting to affirm; and members Jenkins and Murphy dissenting) (App. p. B-1)

The Union was certified as the collective bargaining representative for the three Quality Control Inspectors. The Union proceeded through the contract steps, demanding that IE bargain with it on behalf of the Quality Control Inspectors. At each step IE refused, maintaining throughout that Quality Control Inspectors were supervisory and managerial employees, excluded from the provisions of the contract and the Act.

The Union charged IE with a violation of 29 U.S.C. § 158(a)(5) and on September 27, 1982, the NLRB held that IE had committed an unfair labor practice under that section. (App. p. C-1) IE petitioned the United States Court of Appeals for the Eighth Circuit to review the NLRB order. The NLRB cross-petitioned for enforcement of its order. Enforcement was granted. (App. p. D-1) Jurisdiction of the court of appeals was based on 29 U.S.C. § 160.

REASONS FOR GRANTING THE WRIT

This case involves important considerations of public safety, regulations of the Nuclear Regulatory Commission (NRC), and the proper management of a nuclear power plant.

THE COURT OF APPEALS MISREAD THE NRC REGULATIONS

The court of appeals stated:

"The regulations referred to by Iowa Electric provide in part that

> [t]he persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions.

10 C.F.R. Part 50, Appendix B at 455. Iowa Electric contends that its Quality Control Inspectors are 'persons. . . performing quality assurance functions' within the meaning of the regulation, and that the NLRB's finding that the Inspectors are not managers is inconsistent with this regulation.

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[1] References are to the transcript of hearing and exhibits before the NLRB.

We do not agree. As the NLRB points out in its brief, the regulations do not require that Quality Control Inspectors have this 'authority and freedom;' rather, the regulations provide substantial leeway in organizational structure, as long as someone involved in quality assurance and control has the required authority. At Iowa Electric this authority is lodged with the Quality Supervisor, not the Inspectors." (App. p. D-6)

This simply is not true.

Dr. Sam Tuthill is a Senior Vice President of IE. He reports directly to the President and Chairman of the Board of IE. The Quality Control function reports directly to Mr. Tuthill. (T. pp. 80-82)[1]

Dr. Tuthill testified that Quality Control is one of the most important management functions at the DAEC. As to the Quality Control Inspectors, Dr. Tuthill testified:

> "I think it's an absolute necessity that they function as part of management and that they are a set of eyes and a formal activity that views the manner in which work is being performed, that makes it their business to understand the procedures under which work is to be performed, performs the inspections required and communicates back to management as to the satisfactory nature of work or its unsatisfactory nature.* * * That's absolutely the only way that management has any assurance that the information coming to them represents adequate performance of work." (T. pp. 84-85)

Dr. Tuthill testified that, consistent with the NRC regulations, IE regards Quality Control Inspectors as unquestionably a "management arm." (T. pp. 82-83) Among the NRC regulations referred to by Dr. Tuthill are Title 10, Energy, Code of Federal Regulations. Appendix B to 10 Code of Federal Regulations,

Energy, Part 50, is entitled "QUALITY ASSURANCE CRITERIA FOR NUCLEAR POWER PLANTS AND FUEL RE-PROCESSING PLANTS." That regulation states:

". . . Nuclear power plants and fuel reprocessing plants include structures, systems, and components that prevent or mitigate the consequences of postulated accidents that could cause undue risk to the health and safety of the public. This appendix establishes quality assurance requirements for the design, construction, and operation of those structures, systems and components. *That pertinent requirements of this appendix apply to all activities affecting the safety-related functions of those structures, systems, and components;* these activities include designing, purchasing, fabricating, handling, shipping, storing, cleaning, erecting, installing, *inspecting,* testing, operating, maintaining, repairing, refueling, and modifying.

As used in this appendix, 'quality assurance' comprises all those planned and systematic actions necessary to provide adequate confidence that a structure, system, or component will perform satisfactorily in service. *Quality assurance includes quality control,* which comprises those quality assurance actions related to the physical characteristics of a material, structure, component, or system which provide a means to control the quality of the material, structure, component, or system to predetermined requirements.

* * * *

The quality assurance functions are those of (a) assuring that an appropriate quality assurance program is established and effectively executed and (b) verifying, such as by checking, auditing, and inspection, that activities affecting the safety-related functions have been correctly performed. The *persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to*

identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions. . . "
(App. p. F-4) (emphasis added)

Quality Control Inspectors have this authority and freedom. (T. pp. 26-27)

Pursuant to this regulation the NRC has promulgated "GUIDANCE ON QUALITY ASSURANCE REQUIREMENTS DURING THE OPERATIONS PHASE OF NUCLEAR POWER PLANTS." (App. p. F-5) IE is governed by these requirements. (T. pp. 18-21) They incorporate American National Standard (ANSI) N45.2-1971 which recites the above quotation from the regulation and adds that Quality Control Inspectors shall have authority and organizational freedom to:

> ". . . *control* further processing, delivery, or installation of a non-conforming item, deficiency, or unsatisfactory condition until proper dispositioning has occurred."
> (emphasis added) (App. p. F-7)

IE is also governed by ASNI N45.2.6-1973 which provides that a level II Quality Inspector:

> ". . . shall be capable of *supervising* or maintaining surveillance over the inspections and tests performed by others and of calibrating or establishing validity of calibration of inspections and measuring equipment. He shall have demonstrated proficiency in planning and setting up tests and shall be capable of determing the validity of test results." (App. p. F-8) (emphasis added)

Since this case began IE has become governed by Qualifications of Inspection, Examination and Testing Personnel for Nuclear Power Plants (ANSI N45.2.6.-1978 which states:

> ". . . Additionally, a Level II person shall have demonstrated capabilities in planning inspections, examinations, and tests; in setting up tests including preparation and set-up of related equipment, as appropriate; in supervising or maintaining surveillance over the inspections, examinations, and tests; in supervising and certifying lower level personnel; in reporting inspection, examination, and testing results; and in evaluating the validity and acceptability of inspection, examination, and test results." (App. p. F-9)

As specifically found by the NLRB acting regional director, the Quality Control Inspectors at petitioner's nuclear power plant are Levell II Inspectors. (App. p. A-3)

THE FINDINGS OF THE NLRB AND THE COURT OF APPEALS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

It is abundantly clear that IE regards its Quality Control Inspectors as managers and supervisors. To enable the Quality Control Inspectors to control the operations of the plant they are given authority to "halt production," in effect to shut down the plant. This authority was specifically found to exist by the Acting Regional Director:

> "In reaching this conclusion, the undersigned relies on the fact that the inspectors have no direct supervisory authority with respect to employees in the unit but rather, they possess authority to reject defective parts or products and *they may halt production* pursuant to a hold point if necessary to correct an unacceptable condition." (App. p. A-6) (emphasis added)

The hold points referred to are places in the progress of work beyond which the work shall not proceed until conditions have been determined to be acceptable by a Quality Control Inspector.

Quality Control Inspectors have a hand in establishing hold points. They effectively assign work if they find conditions unacceptable at a hold point, in that additional work must be done to obtain their approval. In that process they exercise independent judgment. (T. pp. 32-34) *In so doing they can determine whether the plant should be shut down.* (T. p. 110) As a result of the exercise of their discretion the work at the plant has at various times been delayed or made more expensive. (T. p. 42) On occasion when the work proceeded beyond a hold point without approval, the Quality Control Inspector initiated the documentation that caused disciplinary action to be taken. (T. pp. 62-63)

The fact that Quality Control Inspectors exercise independent judgment in effectively assigning and directing work was confirmed by one of them. Mr. Hunting testified:

"Q. Did you know when you refused to pass a hold point, the likelihood is that some further work is going to have to be done at that point, didn't you?

A. I would assume that.

Q. So you know when you exercise that judgment and say, 'No, it won't go', that somebody is probably going to have to do more work?

A. To a predetermined standard, yes. That's a judgment You are saying my judgment, but this is my judgment to the standards put out in front of me.

HEARING OFFICER: The question, is, though, do you realize that further work is going to have to be done by somebody?

THE WITNESS: In some cases. *In most cases, yes.*

Q. And you do exercise judgment, don't you, when you decide whether or not a given condition meets the standard you understand you understand it has to meet?

A. The standards that I have been provided.

Q. As a matter of fact —

A. I don't think I answered the question yet, did I?

Q. Go ahead.

A. In a sense, I would be exercising judgment. I wanted to answer yes." (T. pp. 135-136)

Quality Control Inspectors are evaluated on Supervisory Position forms and rated on such abilities as Policy Making, Judgment, Planning, Responsibility, Supervision, and Coordination. A "Non-Supervisory" form is used for other employee evaluations. (T. p. 90; Exhibits E9 and E10)

Quality Control Inspectors fill out Monthly Time Reports, examples of which are Exhibit E11. Their time is charged to Account 517-30. This account is for "OPERATION SUPERVISION AND ENGINEERING - QUALITY CONTROL," and covers the general supervision and direction of the operation of the nuclear power plant. (T. pp. 92-93; Exhibit E12)

Quality Control Inspectors have an office, unrestricted telephones, secretarial assistantes, do not punch a time clock, are on a salary, and account for their own time on a monthly basis. (T. pp. 17-18)

Quality Control Inspectors insure the performance of the Quality Assurance function to achieve safe, efficient and reliable plant performance. They do this without direct supervision. They have the run of the plant. Their area of responsibility is the entire

plant. They inspect, audit and quality for acceptance, materials, parts, supplies, methods, procedures and the work performance of others, in accordance with requirements, specifications, standards, codes, guides and governmental regulations. They independently and without supervision conduct surveys and audits of Quality Control matters. They plan and implement inspection and testing techniques. They prepare their own checklists for their inspection duties. They plan their own work program. They are on no defined schedule. They study technical manuals and publications on company time. In general, they decide when they shall study and when they shall tour and inspect. (T. pp. 30-32)

Quality Control Inspectors participate in the preparation and revision of written procedures for their own work, preparation of Quality Department Directives, and prepare their own checklists. (T. pp. 37-39) They prepare Material and Activities Occurrence Reports (MAOR's) now called Non Conformance Reports (NCR's) which document plant deficiencies. In doing so they exercise independent judgment. They also review NCR's periodically to see that corrective action has been taken, prepare periodic reports and monitor the progress of NCR's. They have a hand in revising Repair Procedure Documents. A part of this is revising hold points. (T. pp. 40-42)

Quality Control Inspectors participate in the management of the plant in regard to the Quality Control function. They attend Quality Control meetings and make recommendations and suggestions which, in the majority of cases, are followed. They are expected to exercise independent judgment in that connection and to attempt to solve Quality Control problems. (T. p. 43) They attend plant management meetings as needed. (T. p. 111)

The Union itself, during negotiations for a contract, recognized

Quality Control Inspectors as "supervisory in nature" and as "management personnel." (T. pp. 94-96; Exhibit E13; T. p. 113)

Pursuant to the mandates of the NRC, IE has vested its Quality Control Inspectors with the required freedom and authority. It is not enough to say, as did the NLRB and the court of appeals, that because the Quality Control Inspectors may not have *all* of the powers that managers and supervisors *may* have, they do not qualify as such.

STATUTES AND CASES

Supervisors are excluded from operation of the provisions of the Act. (29 USC § 152(3) App. p. F-2) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (29 USC § 152(11) App. p. F-2)

One who uses independent judgment to responsibly direct work or to effectively recommend assignment of work is a supervisor. (29 USC § 152(11) App. p. F-2); *Ohio Power Company* v. *NLRB*, 176 F.2d 385, 11 ALR 2d 243 (6th Cir. 1949), *cert. den.* 338 U.S. 899 (1949).

The presence of any one of the requirements is sufficient to classify one as a supervisor. It does not require the exercise of the power described for all or any definite part of one's time. It is the existence of the power which detemines the classification as supervisor. *Ohio Power Company* v. *NLRB*, supra.

Reasons for denying supervisors rights under the act are that

fraternal union feelings would tend to impair a supervisor's ability to apply his employer's policy to subordinates and that pro-union bias might interfere with the exercise of independent judgments. *NLRB* v. *Pilot Freight Carrier, Inc.*, 558 F.2d 205 (4th Cir. 1977), *cert. den.* 434 U.S. 1011 (1978).

Managerial employees also are excluded from the Act. Managerial employees are those who are closely allied with management, who represent management or who formulate and effectuate management policies by expressing and making operative the decisions of their employer. *NLRB* v. *Bell Aerospace Company*, 416 U.S. 267 (1974); *NLRB* v. *North Arkansas Electric Cooperative, Inc.*, 412 F.2d 324 (8th Cir. 1969) and 446 F.2d 602 (8th Cir. 1971).

In *NLRB* v. *Yeshiva University*, 444 U.S. 672, 63 L.Ed.2d 115, 100 S.Ct. 856 (1980), the court stated that persons:

> ". . . may be exempted from coverage under the Act's exclusion for 'supervisors' who use independent judgment in overseeing other employees in the interest of the employer, or under the judicially implied exclusion for 'managerial employees' who are involved in developing and enforcing employer policy. Both exemptions grow out of the same concern: That an employer is entitled to the undivided loyalty of its representatives."

In Yeshiva the court held that university faculty members were managerial employees. In rejecting the NLRB contention to the contrary, the court said:

> "Moreover, the Board's approach would undermine the goal it purports to serve: To ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union."

As the court stated in *Maine Yankee Atomic Power Company* v. *NLRB*, 624 F.2d 347, 360 (1st Cir. 1980):

> ". . . in order to be upheld on review, the Board's determination must be supported by 'substantial evidence,' and that 'substantiality of evidence must take into account whatever in the record fairly detracts from its weight.' *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). The Board thus may not distort the fair import of the record by ignoring whole segments of the uncontroverted evidence; for 'It would seem that the purpose of the "whole record" tests is to limit the opportunity for transmuting a preconception into judgment by picking and choosing what will support that preconception and willfully ignoring whatever weighs against it.' Jaffe, Judicial Control of Administrative Action at 607 (1965)."

What was said about shift operating supervisors (SOS) in Maine Yankee, supra, at page 361, also may be said about Quality Control Inspectors:

> ". . . This responsibility is, in fact, of a unique nature and magnitude. The potentially devastating effects on the surrounding area and on the Company's facility which might follow an erroneous action by the SOS are rather self-evident; and as recent events show, the possibility of such error is not unimaginable. The Report of the President's Commission on the Accident at Three Mile Island concludes that the incident there reflected, at least in part, the fact that operating personnel 'made some improper decisions, took improper actions, and failed to take some correct actions.' Id., at 27. The Commission recommends better training and higher education requirements for operators — a recommendation surely at variance with any notion that

> their responsibilities are minor and routine. On the reverse side of the coin, it may have been an operator's use of responsible independent judgment, according to newspaper reports, which averted a mishap at the nuclear power plant at Crystal River, Florida. See the *Boston Globe*, March 5, 1980."

When one considers IE's heavy responsibility for the safe operation of its nuclear power plant, it seems only reasonable to consider the company's own determination as to who its managers and supervisors will be. This the court of appeals ignored. As stated in *Southern Indiana Gas and Electric Co.* v. *NLRB*, 657 F.2d 878, 886 (7th Cir. 1981):

> "The Board's decision fails to mention the Company's own determination of the system supervisor's status. The Company has the right to define jobs within its own hierarchy and, therefore, to grant supervisory status to employees provided that the actual job duties reflect the designation. The Company's designation of the position as supervisory, while not itself determinative, is certainly a significant factor in ascertaining employee status."

Accord: *Arizona Public Service Company* v. *NLRB*, 453 F.2d 228, 231 (9th Cir. 1971) and *Maine Yankee Atomic Power Company* v. *NLRB*, 624 F.2d 347, 365 (1st Cir. 1980).

The court of appeals also bases its decision on the fact that the Quality Control Inspectors follow established criteria. This reasoning is faulty for several reasons. First, the one Quality Control Inspector who testified at the hearing admitted that they exercised independent judgment in determining whether the criteria were met. (supra, pp. 7-8) Second, it ignores the broad authority and responsibility the NRC requires Quality Control

Inspectors to have. Third, it misrepresents their actual duties as set forth, supra. Fourth, similar contentions by the Board have been rejected by the courts where, as is true here, there was no showing that established procedures for every situation which may be faced. *NLRB* v. *Detroit Edison*, 537 F.2d 239, 243 (6th Cir. 1976); *Southern Indiana Gas and Electric Co.* v. *NLRB*, 657 F.2d 878, 885; and *Maine Yankee Atomic Power* v. *NLRB*, 624 F.2d 347, 362 (1st Cir. 1980). Fifth, if the fact that following established criteria disqualifies one as a manager or supervisor then the president and chairman of the board of IE do not qualify, given the extensive governmental regulation of the nuclear power industry.

CONCLUSION

The central theme running throughout the record in this case is that persons with Quality Control responsibilities must have independence. Inspections shall be performed by individuals other than those who performed the activity being inspected. Quality Control Inspectors are to have authority, freedom and independence; to be able to identify problems, initiate, recommend or provide solutions, and to verify implementation of solutions. They must have control of the plant operations and be capable of supervising and planning. They have the power to stop the work.

Quality Control Inspectors have freedom, discretion, offices, salaries and other marks of supervisors and managers described above. They formulate and effectuate management policies by preparing procedures, checklists, methods and plans. They express and make operative the decisions of their employer by passing judgment on the condition of work and materials.

The reasons for excluding managers and supervisors from the

operation of the provisions of the contract and the Act have special congency here. IE has built the required independence of Quality Control into its management organization at the highest level. It has completely separated it from the production operation, where the employees are represented by the Union. The whole plan will be destroyed if it is to be executed by Union brothers, face to face, one the inspector and the other the inspected.

IE respectfully requests this court to grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

Decision of Direction of Election A-1
Telegraphic Order of the
National Labor Relations Board B-1
Decision and Order of the
National Labor Relations Board C-1
Decision of the United States Court of Appeals
For The Eighth Circuit D-1
Judgment E-1
28 USC § 1254 ..... F-1
29 USCO § 160 ..... F-1
29 USC § 152 ..... F-2
29 USC § 158 ..... F-2
Title 10, Energy, Code of Federal Regulations
(Appendix B) F-3
Guidance on Quality Assurance Requirements During The
Operations Phase of Nuclear Power Plants F-5
Qualifications of Inspection, Examination and Testing
Personnel for the Construction Phase of
Nuclear Power Plants (ANSI N45.2.6-1973) F-7
Qualifications of Inspection, Examination and Testing
Personnel for Nuclear Power Plants
(ANSI N45.2.6-1978) F-9

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

IOWA ELECTRIC LIGHT AND POWER COMPANY

Employer

and

Case No. 18-RC-12199

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 204, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provision of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks a self-determination election in a voting group consisting of quality department inspectors employed by the Employer at its Duane Arnold Energy Center located in Linn County, Iowa. The Employer contends that the quality control inspectors are supervisory and managerial employees within the meaning of the Act, thus not an appropriate unit, and that the petition should, therefore, be dismissed. The parties stipulated that if the quality department inspectors are found to be an appropriate unit, the unit will be added to the production and maintenance unit in the event the quality control inspectors select the Petitioner as their collective bargaining representative.

The Employer's facility, the Duane Arnold Energy Center, employs approximately 142 employees. The Employer is party to a collective bargaining agreement with the Petitioner covering the production and maintenance employees. The current contract is effective from September 1, 1977 to September 1, 1979.

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[1] The Employer, Iowa Electric Light and Power Company, is an Iowa corporation engaged in the generation, distribution and sale of electricity and gas. The Employer annually derives gross revenues in excess of $250,000 and annually purchases goods valued in excess of $50,000 which were shipped to and received by the Employer at its facility located in Iowa directly from points outside Iowa.

There are three employees classified as quality department inspectors, Level II. They have not been represented for collective bargaining purposes. They are responsible for performing inspection, examination and testing activities that assure the quality and safety of a nuclear power plant. The inspectors determine whether the materials, supplies, components, systems and processes conform to predetermined quality requirements so as to insure safe, efficient and reliable plant performance. The inspectors carry out visual examinations of materials to look for physical damage, take dimensional measurements to compare the parts to their design drawings, and perform nondestructive testing (radiographic, ultrasonic, liquid penetrant, magnetic particle, eddy current and leak testing). These predetermined quality requirements are governed by governmental regulations. The quality department inspectors are often involved in the preparation and revision of various quality control directives and check lists including the Employer manual "Administrative Control Procedures." The inspectors do not have the authority or discretion to make any changes in the directives, check lists and standards without the approval of the Quality Supervisor.

Pursuant to governmental regulations, "hold points" are established. A hold point denotes the level at which an activity is halted for failure to conform with appropriate criteria. Work does not continue past that hold point until the inspector determines that the specifications and criteria have been met. The inspectors participate in defining the hold points, and evaluate whether an item or procedure is acceptable. The effect of finding an item or procedure unacceptable, and thus not satisfying a hold point, is that the department responsible for correcting the deficiency must do so. The inspectors do not themselves assign this corrective work, nor do they have discretion to change the acceptance criteria in the hold points.

If an inspector determines that a particular condition does not meet quality assurance requirements, he must complete a Material and Activities Occurrence Report (MAOR). The inspectors review the MAOR's and prepare reports regarding the progress and status of the MAOR's. Although the inspectors initiate the MAOR's, they generally do not advise employees as to whether they should continue to function past the hold point, nor do they recommend discipline for an employee who passes a hold point. The inspectors also occasionally provide input on the hold points to be used in the Repair Procedure Documents, as well as other records necessary to document the inspections and audits.

The inspectors have never been told they have authority to hire, fire, interview, promote, transfer, discipline or otherwise supervise employees, to assign work, or to effectively recommend such action, nor is there evidence that they actually have this authority. Inspectors rarely, if ever, attend management meetings. They are never consulted about labor relations or grievances. Currently there are six other quality department inspectors who are contracted from consulting firms outside the Employer, and thus they are not employees of the Employer. The three quality department inspectors have no authority over the contract inspectors.

Although most inspections are planned, inspections can be requested at any time by a quality engineer or the Quality Control Supervisor. The inspectors submit written requests for equipment necessary to perform their inspections.

Presently, two of the inspectors report to the Quality Control Outage Coordinator, and one inspector reports to Quality Engineer, Procurement. The Quality Control Outage Coordinator and the Quality Engineer, Procurement report to the Quality Control Supervisor. The inspectors have offices in the receiving

inspection area of the warehouse, in a building different from that of the offices of their supervisors. They share a secretary with their supervisor. The inspectors are on salary, do not punch a clock, are not paid overtime, and submit their time on a monthly basis. They are evaluated on a "supervisor" evaluation form, as are all other employees who work under the Quality Control Supervisor. The inspectors do not dress differently from other employees, except for guards, who wear uniforms. The record does not reflect if there are any educational requirements for an inspector; the only inspector witness testified that he had a high school degree and one year of college. The Employer has paid for technical training for the inspectors, as it has done for other employees. The inspectors request time off, raises and vacations from the Quality Control Supervisor.

In view of the foregoing and the record as a whole, I find that the quality department inspectors are not managerial employees within the meaning of the Act. In reaching this decision, the undersigned relies on the facts that they do not formulate management policies, and can only make recommendations concerning the criteria and check lists to be used in their inspections. Further, it does not appear that the quality department inspectors have discretion in the performance of their jobs independent of the Employer's established policy. The judgments and decisions made by the inspectors appear to be primarily technical in nature and limited by pre-existing established policy. Thus, I find that the quality department inspectors do not exercise sufficient independent discretion in their jobs to truly align them with management, nor that their participation in a labor organization would create a conflict of interest. Accordingly, I find that a voting group consisting of the Employer's quality department inspectors is appropriate. *Bechtel, Incorporated*, 225 NLRB 197 (1976).

Additionally, on the basis of the entire record, I find that the quality department inspectors are not supervisors within the meaning of the Act. In reaching this conclusion, the undersigned relies on the fact that the inspectors have no direct supervisory authority with respect to employees in the unit but rather, they possess authority to reject defective parts or products and they may halt production pursuant to a hold point if necessary to correct an unacceptable condition. There is no evidence that the inspectors have any authority to make recommendations concerning employees who pass the hold point, or that they possess any supervisory authority over any employees. Accordingly, I find that the quality department inspectors are not supervisors within the meaning of the Act. *Modine Manufacturing Company*, 180 NLRB 472 (1969).

6. Based on the agreement of the parties that the quality control inspectors may be added to the existing production and maintenance unit should they elect to be represented, I shall provide the quality department inspectors a self-determination election to express their desire with respect to being included in the bargaining unit currently represented by the Petitioner. Accordingly, I shall direct an election among the employees in the following voting group:

> All quality department inspectors employed by the Employer at its Duane Arnold Energy Center facility; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

If a majority of employees in the above voting group select the Petitioner as their bargaining representative, they shall be included in the existing collective bargaining unit presently represented by the Petitioner; otherwise, they shall remain unrepresented.

DIRECTION OF ELECTION[2]

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period ending immediately before the date below, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve months before the election date and who retained their status as such during the eligibility period and their replacements. Those in military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the

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[2] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this decision, two copies of an election eligibility list, containing the names and addresses of all the eligible voters shall be filed with the undersigned by the Employer and the undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in the Minneapolis Regional Office, 316 Federal Building, 110 South Fourth Street, Minneapolis, Minnesota 55401, on or before March 30, 1979. No extension of time to file this list shall be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

election date, and employees engaged in an economic strike which commenced more than twelve months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 204, AFL-CIO.

Dated at Minneapolis, Minnesota, this 23rd day of March, 1979.

/s/ Herbert S. Dawidoff

Herbert S. Dawidoff, Acting Regional Director
National Labor Relations Board - Eighteenth Region

APPENDIX B

D G RIBBLE ESQ LYNCH DALLAS SMITH AND HARMAN
526 SECOND AVE SE
PO BOX 2457
CEDAR RAPIDS, IOWA 52406

RE IOWA ELECTRIC LIGHT AND POWER CO. 18 RC 12199 BY TELEGRAM DATED APRIL 23, 1979, THE BOARD GRANTED THE EMPLOYER'S REQUEST FOR REVIEW OF THE ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION AND STAYED THE ELECTION PENDING DECISION ON REVIEW. HAVING DULY CONSIDERED THE ENTIRE RECORD, INCLUDING THE SUBMISSIONS FROM THE PARTIES AND FROM AMICI CURIAE, THE BOARD DECIDED TO, AND HEREBY DOES, AFFIRM THE ACTING REGIONAL DIRECTOR,. THE REQUEST FOR ORAL ARGUMENT IS DENIED. ACCORDINGLY, THE CASE IS REMANDED TO THE REGIONAL DIRECTOR FOR THE PURPOSE OF CONDUCTING THE ELECTION PURSUANT TO SUCH DECISION EXCEPT THAT THE ELIGIBILITY PAYROLL PERIOD SHALL BE THAT IMMEDIATELY PRECEDING THE DATE OF THIS ORDER AND A REVISED ELIGIBILITY LIST, CONTAINING THE NAMES AND ADDRESSES OF ALL ELIGIBLE VOTERS, MUST BE FILED BY THE EMPLOYER WITH THE REGIONAL DIRECTOR FOR REGION 18 WITHIN 7 DAYS FROM THE DATE OF THIS ORDER. DATED WASHINGTON DC JULY 1?/1??9977, JOHN H FANNING, CHAIRMAN, JOHN A PENELLO, MEMBER, JOHN C TURESDALE MEMBER. HOWARD

JENKINS, JR., MEMBER, DISSENTING, WOULD REVERSE AND DISMISS THE PETITION: BETTY SOUTHARD MURPHY, MEMBER, DISSENTING, WOULD FIND THE QUALITY INSPECTORS TO BE MANAGERIAL PERSONNEL AND NOT EMPLOYEES WITHIN THE MEANING OF THE ACT FOR THE REASONS STATED IN HER DISSENT IN BECHTEL INCORPATED 225 NLRB 197 (1976)
DATED JULY 17, 1979
MARIO LAURO JR ASSOC EXEC SECY NLRB WSH

APPENDIX C

264 NLRB No. 21

FJZ
D—9279
Palo, IA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IOWA ELECTRIC LIGHT AND POWER COMPANY

and

Case 18—CA—7594

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 204, AFL-CIO

DECISION AND ORDER

Upon a charge filed on February 19, 1982, and amended on March 2, 1982, by International Brotherhood of Electrical Workers, Local Union 204, AFL-CIO, herein called the Union, and duly served on Iowa Electric Light & Power Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 18, issued a complaint on March 29, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on October 12, 1979, following a Board election in Case 18—RC—12199, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's

employees in the residual voting group found appropriate;[1] and that, commencing on or about August 19, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 9, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

In 1972, in Case 18—RC—9311, as amended in 1973 by Case 18—AC—29, the Union was certified as the collective-bargaining agent for a unit of Respondent's production and maintenance employees. The Acting Regional Director in the instant case determined that the residual group involved herein is eligible for inclusion in the existing production and maintenance unit already represented by the Union.

On May 18, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 28, 1982, the Board issued an order transferring the proceedings to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause, and the Union filed a joinder to the General Counsel's motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations

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[1] Official notice is taken of the record in the representation proceeding, Case 18—RC—12199, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967); enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, and response to the Notice To Show Cause, Respondent denies the validity of the Union's certification based on its contention that the Board erred in including Respondent's quality department inspectors in an appropriate residual voting group eligible for inclusion in the existing production and maintenance unit already represented by the Union.[2] Counsel for the General Counsel asserts in her Motion for Summary Judgment that Respondent is attempting to relitigate issues which were fully litigated in the underlying representation proceeding. We agree.

Our review of the record herein, including the record in Case 18—RC—12199, reveals that on March 23, 1979, the Acting Regional Director for Region 18 issued a Decision and Direction of Election directing that an election be held among Respondent's quality department inspectors at its Duane Arnold Energy Center facility to determine whether those employees desired to be represented by the Union, which was already certified to represent the production and maintenance employees at the facility.[3] On March 30, 1979, Respondent filed a request for

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[2] Respondent stated in its letter to the Union declining the Union's request to bargain with Respondent that "we intend to have the Certification... reviewed by the U.S. Court of Appeals for the 8th Circuit. Therefore, [we] will not bargain with you now."

[3] Respondent and the Union signed a collective-bargaining agreement covering the production and maintenance employees, effective September 1, 1979, through September 1, 1981. The parties stipulated that, if the quality depart-

(con't.)

review contending, *inter alia*, that the Acting Regional Director erred by concluding that the quality department inspectors were not supervisors or managerial employees within the meaning of the Act, and that therefore they were eligible to vote in the election. The Board, Members Jenkins and Murphy dissenting, affirmed the Acting Regional Director's decision by telegraphic decision dated July 17, 1979. Pursuant to that direction, an election was held on August 8, 1979. Respondent challenged the ballots of all three eligible voters on the ground that they were supervisors. The Regional Director overruled those challenges in a Supplemental Decision and Order issued August 20, 1979. The Board, Member Murphy dissenting, by telegraphic decision of October 2, 1979, denied Respondent's request for review of the Supplemental Decision and Order. After opening and counting the challenged ballots, the revised tally of ballots shows three votes for, and no votes against, the Union. The Regional Director on October 12, 1979, certified the Union as the exclusive bargaining representative of the quality department inspectors.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly

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[3] (con't)
ment inspectors were found to be an appropriate unit, that unit would be added to the production and maintenance unit in the event the quality department inspectors selected the Union as their collective-bargaining representative.

[4] See *Pittsburgh Plate Glass Co.* v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.[5] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice

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[5] Respondent in its answer and in its response to Notice To Show Cause maintains that: the October 12, 1979, certification, even if originally valid, has expired; the charge was not filed within 6 months after Respondent was alleged to have refused to bargain; and the Union has waived its claim that Respondent refused to bargain. We note that, based on long-established Board principles, none of these defenses has merit here. Thus, as to the first, a certified union is irrebuttably presumed to have majority status for 1 year after certification and after that year is presumed to continue to have majority status unless and until the employer demonstrates either that the Union no longer in fact has majority status or that its refusal to bargain was predicated on a good-faith doubt based on objective considerations. *Terrell Machine Company*, 173 NLRB 1480, 1480-81 (1969); *Pioneer Inn Associates, d/b/a Pioneer Inn and Pioneer Inn Casino*, 228 NLRB 1263, 1265 (1977). Respondent failed to prove or even allege such a good-faith doubt or in fact lack of majority status. As to Respondent's second claim, although the charge in this case was filed February 19, 1982, more than 6 months after the Union's October 19, 1979, request for bargaining and Respondent's October 17, 1979, refusal, the Board treats a request for bargaining as continuing and has held that the failure to respond affirmatively to such a continuing request gives rise to a continuing violation of Sec. 8(a) (5) and (1). *Dardanell Enterprises, Inc.*, 250 NLRB 377, 379 (1980); *Sewanee Coal Operators' Association, Inc.*, 167 NLRB 172, fn. 3 (1967). In addition, the Board holds that an explicit refusal to bargain — made in order to test the certification — is considered a continuing refusal to bargain. *Dardanell*, 250 NLRB at 379, fn. 7; *Williams Energy Company*, 218 NLRB 1080, 1080, fn. 4 (1975). Moreover, the Union on January 18, 1982, sent Respondent a letter demanding bargaining. Respondent's refusal of this demand constitutes grounds for yet another cause of action concerning Respondent's alleged refusal to bargain in violation of the Act, and thus the February 19, 1982, charge is, in any event, timely filed as to Respondent's refusal to bargain after January 18, 1982. Respondent's waiver defense is also meritless. Following Respondent's October 17, 1979, refusal to bargain, the Union filed a grievance pursuant to the collect-bargaining agreement which provided that the contract covered all employees within the unit defined by the NLRB. Respondent denied the grievance, and the Union filed suit under Sec. 301 of the Labor Management Relations Act of 1947 (29 U.S.C. §185), claiming that the quality department inspectors were

(con't)

proceeding. Accordingly, we grant the Motion for Summary Judgment.[6]

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is, and has been at all times material herein, an Iowa corporation and has engaged in the generation, transmission, distribution, and sale of electricity and gas, and has maintained a facility in Linn County, Iowa, known as the Duane Arnold Energy Center. During the calendar year ending December 31, 1981, Respondent in the course and conduct of its business operations derived gross revenues in excess of $250,000, sold and shipped from Iowa goods and materials valued in excess of $50,000 directly to points outside Iowa, and purchased and received at its Duane Arnold facility goods and materials valued in excess of $50,000 directly from points outside the State of Iowa.

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[5] (con't)
part of the unit, due to the NLRB certification, and that Respondent's refusal to bargain violated the contract. After a 1980 Federal district court ruling in favor of the Union (*Local 204* v. *Iowa Electric Light & Power*, 496 F.Supp. 873 [N.D. Ia. 1980]), the Eighth Circuit Court of Appeals on January 8, 1982, issued an opinion (668 F.2d 413) in which it found that the Union's suit was essentially an attempt to obtain review of an NLRB factual finding in a representation case and therefore reversed, holding that the district court had no jurisdiction. The Union then sent its January 18, 1982, letter, noted above, demanding that Respondent bargain. Under these circumstances, it is clear that the Union has not waived its claim and in fact the Union has repeatedly and persistently adhered to its claim that Respondent has refused to bargain.

[6] As previously noted, Member Jenkins dissented with respect to the Board's denial of Respondent's request for review concerning the inclusion of quality department inspectors. However, as that issue was fully litigated in the representation proceeding, Member Jenkins, for institutional reasons, joins in the decision to grant the Motion for Summary Judgment.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

International Brotherhood of Electrical Workers, Local Union 204, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute an appropriate residual group, eligible for inclusion in the existing production and maintenance unit currently represented by the Union, for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All quality department inspectors employed by the Employer at its Duane Arnold Energy Center facility; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On August 8, 1979, a majority of the employees of Respondent in said residual group, in a secret-ballot election conducted under the supervision of the Regional Director for Region 18, designated that the Union may bargain for the employees in said residual group as part of the existing production and maintenance unit it already represented.

The Union was certified on October 12, 1979, as the collective-bargaining representative of the employees in said residual group as part of the unit it already represented and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about October 9, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 17, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective-bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 19, 1981, the date 6 months prior to the filing date of the charge in Case 18—CA—7594,[7] and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to

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[7] See *Dardanell*, 250 NLRB at 380.

lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Iowa Electric Light & Power Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Union 204, AFL-CIO, is a labor organization within the meaning

of Section 2(5) of the Act.

3. All quality department inspectors employed by the Employer at its Duane Arnold Energy facility, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute an appropriate residual group eligible for inclusion in the existing production and maintenance unit currently represented by the Union for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 12, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid residual group for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 19, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Iowa Electric Light & Power Company, Linn County, Iowa, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Electrical Workers, Local Union 204, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate residual group who are eligible for inclusion in the existing production and maintenance unit:

> All quality department inspectors employed by the Employer at its Duane Arnold Energy Center facility; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Duane Arnold Energy Center facility copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 18, after duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. September 27, 1982

_____

John H. Fanning, Member

_____

Howard Jenkins, Jr., Member

_____

Don A. Zimmerman, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

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[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR REALTIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Electrical Workers, Local Union 204, AFL-CIO, as the exclusive representative of the employees in the appropriate unit, including the residual group described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the appropriate unit, including the residual group described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The residual group, eligible for inclusion in the existing production and maintenance unit, is:

> All quality department inspectors employed by the Employer at its Duane Arnold Energy Center facility; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

C-14

IOWA ELECTRIC LIGHT &
POWER COMPANY

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 316, 110 South Fourth Street, Minneapolis, Minnesota 55401, Telephone 612-725-2615.

APPENDIX D

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 82-2262

IOWA ELECTRIC LIGHT AND POWER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

LOCAL UNION NO. 204 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ALF-CIO,

Intervenor.

Petitioner For Review of Order of National Labor Relations Board

Submitted: June 15, 1983
Filed: September 12, 1983

Before LAY, Chief Judge, and HENLEY and BROWN,* Senior Circuit Judges.

HENLEY, Senior Circuit Judge.

This is a petition for review of an order of the National Labor Relations Board (NLRB) by Iowa Electric Light and Power Company, and a cross-petition for enforcement of the order by the NLRB. The issue is whether Quality Control Inspectors at Iowa Electric's nuclear power plant are employees or managers-supervisors. We enforce the Board's order.

*The Honorable Bailey Brown, United States Senior Circuit Judge for the Sixth Circuit, sitting by designation.

Iowa Electric employes three Quality Control Inspectors at its Duane Arnold Energy Center, a nuclear power plant. Iowa Electric and Local 204 of the International Brotherhood of Electrical Workers (the Union) have a collective bargaining agreement covering production and maintenance employees. The Union petitioned the NLRB to add Quality Control Inspectors to the bargaining unit. The petition was opposed by Iowa Electric on the ground that the Inspectors were supervisors. After a hearing the Regional Director found that the Inspectors were employees, not managers or supervisors, and ordered an election. The Union won, but Iowa Electric refused to bargain with the Union concerning the Inspectors. The Union brought suit in federal district court against Iowa Electric under the Labor Management Relations Act, but the case was dismissed on appeal for lack of jurisdiction. *Local Union 204* v. *Iowa Electric Light and Power Co.*, 668 F.2d 413 (8th Cir. 1982). The Union then charged Iowa Electric with a violation of the National Labor Relations Act (the Act), and the NLRB found that Iowa Electric had engaged in unfair labor practices in violation of § 8(a) (5) of the Act. 29 U.S.C. § 158(a) (5). The NLRB ordered Iowa Electric to bargain with the Union. It is that order which is now before the court.

All employees properly characterized as "managerial" are excluded from the protections of the Act. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). Managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* at 288. "[N]ormally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *NLRB* v. *Yeshiva University*, 444 U.S. 672, 683 (1980).

Nor are supervisors covered by the Act. 29 U.S.C. § 152(3). An employee is declared by the Act to be a supervisor if he or she has authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action," provided the exercise of such activity "is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11). Authority to do only one of these listed acts is enough to make an employee a supervisor. *NLRB* v. *St. Mary's Home, Inc.*, 690 F.2d 1062, 1065 (4th Cir. 1982); *NLRB* v. *Sayers Printing Co.*, 453 F.2d 810, 814 (8th Cir. 1971).

The Board found that the Quality Control Inspectors "are responsible for performing inspection, examination, and testing activities that assure the quality and safety of a nuclear power plant. The Inspectors determine whether the materials, supplies, components, systems and processes conform to the predetermined quality requirements so as to insure safe, efficient and reliable plant performance." The Board found that the Inspectors used checklists in making these inspections, and that they had no authority to vary the terms of those checklists. Thus, the Board considered the decisions of the Quality Control Inspectors to be "primarily technical in nature and limited by pre-existing established policy."

Iowa Electric challenges the Board's findings on three grounds. First, it argues that because an inspection can result in changes in working assignments, Quality Control Inspectors "assign work" as that term is used in the definition of supervisor. Second, it argues that because reports written by Inspectors are used in the disciplinary process against other employees, Quality Control Inspectors discipline other employees. Third, Iowa Electric

argues that the job description of Quality Control Inspectors which is written by the Nuclear Regulatory Commission requires that Quality Control Inspectors have leeway and freedom to correct mistakes and take preventive action. In addition to these arguments, a conflict of interest argument has been put forth by other utility companies in an amicus curiae brief. We will examine each argument in turn, in view of the large measure of discretion exercised by the Board in determining whether or not employees are supervisors or managers. *NLRB* v. *Broyhill Co.*, 514 F.2d 655, 658 (8th Cir. 1975).

Part of a Quality Control Inspector's job is to examine conditons at certain "hold points." Hold points are established pursuant to government regulations, and are levels at which activity is halted until an inspector determines that the necessary specifications and criteria have been met. If the criteria are found not to have been met, work cannot continue until the deficiency is corrected. If the deficiencies are serious enough, the plant may be shut down.

Iowa Electric argues that when an Inspector finds that criteria are not met, he is "effectively" assigning work, since corrections must be performed and usual activity is halted until the corrections are made. Iowa Electric stresses the possibility that the plant could be shut down as a result of an Inspector's decision that something is wrong. Iowa Electric argues that because Inspector's "effectively assign work," they are supervisors as defined by the Act.

The Board found that the Inspectors have no authority or discretion to change or waive the acceptance criteria at the hold points. Their "decisions" are merely that the criteria are not met, not that work must stop or that the plant must be shut down. Further, the Inspectors themselves do not order the corrective

work; they merely report the deficiency to the Quality Supervisor, who decides what corrections must be made. The Board found that corrective action and the halting of work are part of the process rather than consequences of an Inspector's independent decision. These findings support the Board's conclusion that Inspectors do not assign or direct work.

Iowa Electric's second argument is that Inspectors initiate the disciplinary process against other employees. When an Inspector finds something amiss at a hold point, he fills out a Material and Activities Occurrence Report (MAOR). The MAOR may be used in determining whether any employee should be disciplined as a result of the problem identified in the MAOR. Iowa Electric contends that because the MAOR may be used in evaluating the performance and disciplining of other employees, Inspectors who write the MAORs are supervisors.

The Board found that Inspectors do not recommend that employees be disciplined; the main purpose of the MAOR is to point out a deficiency, not to point out who has made a mistake. Further, the Inspectors play no further role in any disciplinary decisions. This evidence provides substantial support for the Board's conclusion that the Inspectors do not discipline employees and thus are not supervisors.

Iowa Electric's third argument is that the Board's decision ignors NRC regulations which require that Inspectors have a good deal of authority, and that the degree of authority required by those regulations makes the Inspectors managers.

The regulations referred to by Iowa Electric provide in part that

> [t]he persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify

> quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions.

10 C.F.R. Part 50, Appendix B at 455. Iowa Electric contends that its Quality Control Inspectors are "persons. . . performing quality assurance functions" within the meaning of the regulation, and that the NLRB's finding that the Inspectors are not managers is inconsistent with this regulation.

We do not agree. As the NLRB points out in its brief, the regulations do not require that Quality Control Inspectors have this "authority and freedom;" rather, the regulations provide substantial leeway in organizational structure, as long as someone involved in quality assurance and control has the required authority. At Iowa Electric this authority is lodged with the Quality Supervisor, not the Inspectors. The Quality Supervisor has daily meetings with the Senior Vice President to discuss the department's activities, and also meets regularly with the Chief Engineer. Further, it is the Quality Supervisor who evaluates MAORs and decides what corrective action should be taken. Inspectors possess no comparable organizational authority. They do not meet regularly with the Supervisor, and none has ever met with the Vice President. They do make suggestions for changes, but they do not have the authority to implement those changes without approval. We do not view the NLRB's decision as inconsistent with NRC regulations, because Iowa Electric itself has elected to vest the authority required by the NRC in the Quality Supervisor, not the Quality Control Inspectors.

The amicus curiae brief filed in this case by other utilities points out the possibility of a conflict of interest, since Quality Control Inspectors will be inspecting work done by fellow union members. The amici urge that Quality Control Inspectors may

allow their desire not to get fellow union members into trouble to outweigh their job duties, to the detriment of plant safety.

The Regional Director expressly found no conflict of interest. He relied upon *Bechtel, Inc.*, 225 NLRB 197 (1976), in which the Board held that when the employer had a "substantial degree of control over the work performance of the inspectors," inspectors were not managers. The Board concluded that there was "no basis for presuming that representation. . . will result in an impairment of performance of their duties." In this case, as in *Bechtel*, the Quality Control Inspectors are carefully supervised. Further, disciplinary action does not always result from an MAOR. Finally, there is nothing in the record to suggest that the Inspectors would ignore mistakes or insufficiencies. In light of their sure knowledge of the potentially deadly consequences of overlooking mistakes, we cannot assume that the Inspectors would be callously irresponsible.

The Board's decision must be upheld if it is supported by substantial evidence. *NLRB* v. *Sayers Printing Co.*, 453 F.2d at 815. In this case, there is substantial evidence that Quality Control Inspectors do not have supervisory or managerial jobs; their decision-making is of a technical nature and is limited by pre-established policy; they do not offer specific corrections when mistakes are discovered; they have no authority to hire, fire, or discipline other employees; and they have little contact with management. While we recognize that there is also some support for a contrary conclusion, we do not consider that it is our role to draw the line; that is the role of the NLRB. The order of the NLRB is therefore enforced.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX E

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 82-2262 **September Term, 1982**

IOWA ELECTRIAL LIGHT AND POWER COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELAITONS BOARD,

Respondent.

LOCAL UNION NO. 204 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO,

Intervenor

JUDGMENT

BEFORE: LAY, Chief Judge, and HENLEY and BOWMAN, Senior Circuit Judges

On September 12, 1983, the Court being fully advised in the premises handed down its opinion granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF it is hereby ordered and adjudged that the said order of the National Labor Relations Board be enforced and that Iowa Electric Light and Power Company, its officers, agents, successors, and assigns, abide by and perform the directions in said order.

Clerk, United States Court
of Appeals for the Eighth Circuit

Total costs of respondent for recovery from petitioner for briefs: $47.00

APPENDIX F

28 USC § 1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * *

29 USC § 160:

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practices in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner

be conclusive.

* * * *

29 USC § 152:

When used in this subchapter —

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at this home, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * *

29 USC § 158:

(a) It shall be an unfair labor practice for an employer —

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

• • • •

Title 10, Energy, Code of Federal Regulations

"Appendix B — Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants

Introduction. Every applicant for a construction permit is required by the provisions of § 50.34 to include in its preliminary safety analysis report a description of the quality assurance program to be applied to the design, fabrication, construction, and testing of the structures, systems, and components of the facility. Every applicant for an operating license is required to include, in its final safety analysis report, information pertaining to the managerial and administrative controls to be used to assure safe operation. Nuclear power plants and fuel reproceesing plants include structures, systems, and components that prevent or mitigate the consequences of postulated accidents that could cause undue risk to the health and safety of the public. This appendix established quality assurance requirements for the design, construction, and operation of those structures, systems, and components. The pertinent requirements of this appendix apply to all activities affecting the safety-related functions of those structures, systems, and components; these activities include designing, purchasing, fabricating, handling, shipping, storing, cleaning, erecting, installing, inspecting, testing, operating, maintaining, repairing, refueling, and modifying.

As used in this appendix, "quality assurance" comprises all those planned and systematic actions necessary to provide adequate confidence that a structure, system, or component will

perform satisfactorily in service. Quality assurance includes quality control, which comprises those quality assurance actions related to the physical characteristics of a material, structure, component, or system which provide a means to control the quality of the material, structure, component, or system to predetermined requirements.

I. Organization

The applicant[1] shall be responsible for the establishment and execution of the quality assurance program. The applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility therefor. The authority and duties of persons and organizations performing activities affecting the safety-related functions of structures, systems, and components shall be clearly established and delineated in writing. These activities include both the performing functions of attaining quality objectives and the quality assurance functions. The quality assurance functions are those of (a) assuring that an appropriate quality assurance program is established and effectively executed and (b) verifying, such as by checking, auditing, and inspection, that activities affecting the safety-related functions have been correctly performed. The persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions. Such persons and organizations performing quality

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[1] While the term "applicant" is used in these criteria, the requirements are, of course, applicable after such a person has received a license to construct and operate a nuclear power plant or a fuel reprocessing plant. These criteria will also be used for guidance in evaluating the adequacy of quality assurance programs in use by holders of construction permits and operation licenses.

assurance functions shall report to a management level such that this required authority and organizational freedom, including sufficient independence from cost and schedule when opposed to safety considerations, are provided. Because of the many variables involved, such as the number of personnel, the type of activity being performed, and the location or locations where activities are performed, the organizational structure for executing the quality assurance program may take various forms provided that the persons and organizations assigned the quality assurance functions have this required authority and organizational freedom. Irrespective of the organizational structure, the individual(s) assigned the responsibility for assuring effective execution of any portion of the quality assurance program at any location where activities subject to this Appendix are being performed shall have direct access to such levels of management as may be necessary to perform this function. . ."

* * * *

Guidance on Quality Assurance Requirements During the Operations Phase of Nuclear Power Plants

"A. **Introduction**

The purpose of this document is to provide guidance concerning establishment and execution of a quality assurance program for the operations phase of nuclear power plants.

B. **Discussion**

Appendix B, "Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants," to 10 CFR Part 50 established quality assurance requirements for the design, construction, and operation of safety-related structures, systems, and components of nuclear power plants.

* * * *

The responsibility of establishing national standards related to the operations phase of nuclear power plants rests with Subcommittee ANS-3, Reactor Operations,[1] of the American Nuclear Society Standards Committee. The ANS-3 Subcommittee has prepared a standard N18.7-1972 (ANS-3.2), "Administrative Controls for Nuclear Power Plants," which contains criteria for administrative controls of nuclear power plants during operation. While this standard contains requirements and recommendations compatible with Appendix B to 10 CFR Part 50 for administrative controls necessary for safe and efficient operation of nuclear power plants, it does not fully address the quality assurance criteria of Appendix B to 10 CFR Part 50 with regard to those aspects of a quality assurance program that are required during operation and which are essentially the same as those existing during the design and construction phase. *In order to satisfy the requirements of Appendix B to 10 CFR Part 50, ANSI N18.7-1972 must be used in conjunction with ANSI N45.2-1971,* "Quality Assurance Program Requirements for Nuclear Power Plants," which includes general requirements and guidance for the establishment of quality assurance programs during the design, construction, and operation phases of nuclear power plants. These two standards were intended to complement each other with regard to the quality assurance program requirements for the operations phase of plants.

* * * *

Quality assurance organizations should be established both onsite and offsite. Section 3 of ANSI N45.2-1971 states: "Persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to:

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[1] Subcommittee ANS-3 is sponsored by the American Nuclear Society Reactor Operations Division

(1) identify quality problems;
(2) initiate, recommend, or provide solutions through designated channels;
(3) verify implementation of solutions; and
(4) control further processing, delivery, or installation of a nonconforming item, deficiency, or unsatisfactory condition until proper dispositioning has occurred."

Section 3 of ANSI N45.2-1971 further states that the person or organization responsible for defining and measuring the overall effectiveness of the quality assurance program shall be designated, shall be sufficiently independent from the pressures of production, shall have direct access to responsible management at a level where appropriate action can be required, and shall report regularly on the effectiveness of the program."

* * * *

Qualifications of Inspection, Examination, and Testing Personnel for the Construction Phase of Nuclear Power Plants

ANSI N45.2.6—1973

"3. Qualifications

The requirements contained within this section are intended to define the minimum capabilities that qualify personnel to perform quality assurance functions that are within the scope of this standard. The capability requirements of nondestructive examination personnel shall be as specified in SNT-TC-1A and supplements. The capability requirements of other personnel covered by this standard shall be as specified in the following paragraphs.

The qualifications have been defined in terms of three levels of capability. The categorization of requirements that are defined

are not intended to be limiting with regard to company position or professional status, but are merely a convenient method of defining functional activities.

3.1 Levels of Capability

Three levels of capability for persons who perform inspections and tests; or who participate in the approval of procedures, the handling of data or test results, or the control of reports and records are delineated below. The education and experience requirements specified for the various levels should not be treated as absolute when other factors provide reasonable assurance that a person can competently perform a particular task. Other factors may be demonstrated capability in a given job through previous performance or satisfactory completion of proficiency testing."

* * * *

"*3.1.2 Level II.* To be considered for certification, a candidate must satisfy one of the following requirements:

(1) Graduate of a four-year accredited engineering or science college or university, plus two years of experience in quality assurance including testing or inspection (or both) of equivalent construction and installation activities.
(2) High school graduate, plus four years of experience in testing or inspection (or both) of power plant, nuclear plant, heavy industrial, or other similar equipment or facilities."

* * * *

"A *Level II* person shall have experience and training in the performance of required inspections and tests and in the organization and evaluation of the results of the inspections and tests. He shall be capable of supervising or maintaining surveillance over the inspections and tests performed by others and of calibrating or establishing validity of calibration of inspections

and measuring equipment. He shall have demonstrated proficiency in planning and setting up tests and shall be capable of determining the validity of test results."

• • • •

QUALIFICATIONS OF INSPECTION, EXAMINATION AND TESTING PERSONNEL FOR NUCLEAR POWER PLANTS (AN45.2.6-1978)

". . . The requirements of this Standard apply to personnel who perform inspections, examinations, and tests during fabrication prior to and during receipt of items at the construction site, during construction, during preoperational and startup testing, and during operational phases of nuclear power plants."

• • • •

3.3 Level II Personnel Capabilities

A Level II person shall have all of the capabilities of a Level I person for the inspection, examination or test category or class in question. Additionally, a Level II person shall have demonstrated capabilities in planning inspections, examinations, and tests; in setting up tests including preparation and set-up of related equipment, as appropriate; in supervising or maintaining surveillance over the inspections, examinations, and tests; in supervising and certifying lower level personnel; in reporting inspection, examination, and testing results; and in evaluating the validity and acceptability of inspection, examination, and test results.

CERTIFICATE OF SERVICE

I certify that on December 7, 1983, I served a copy of the foregoing Petition for Writ of Certiori and Appendix by certified mail upon each of the

following persons at their respective addresses:

NATIONAL LABOR RELATIONS BOARD
MR. FREDERICK HAVARD
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

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